

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
)
Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)
)
Rate Regulation)

CS Docket No. 96-60

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ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

AND FURTHER NOTICE OF PROPOSED RULEMAKING

FCC 96-122

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Table of Contents

ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Billing and Collection Services	6
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FURTHER NOTICE OF PROPOSED RULEMAKING

Maximum Rate Formula, Economic Justification	6
Channel Bumping Costs	7
Choosing Among Competing Programmers	8
Program Categories	8
Avoiding Leased Access Monoculture	10
Designating Leased Access Channels	11
Opportunity Costs	11
How Affiliates Influence License Fees	12
Administrative Fees for Part-time Lessees	13
Transition Period for New Formula	13
Requests to Open a New Channel	14
Part-time Channels	14
Substitution of Minority and Educational Programmers	14
CPA Review	15
Time Limit to Resolve Complaints	15
Conclusion	16
Appendix	19

Video Information Providers for Non-discriminatory Access (VIPNA) is a national, non-profit trade association committed to non-discriminatory access to electronic distribution of independent video programs. VIPNA's goals are to diversify programming choices, encourage competition and investment in quality programming, and advocate a reliance on market forces in place of monopsony control of television program distribution.

In a 1993 speech, Vice President Al Gore called for non-discriminatory access to cable channels:

“We cannot permit the creation of information bottlenecks that adversely affect information providers who use the highways as a means of supplying their customers. Nor can we permit bottlenecks for information consumers who desire programming that may not be available through the wires that enter their homes or offices.”

Congress established the statutory framework for commercial leased access in the 1984 Cable Act. Twelve years (and an amended Cable Act) later, leased access is significantly under-used. By the Commission's own admission, the total number of leased access programmers or cable systems providing leased access is unknown.

The 1992 Senate Report indicates that rates are one reason that leased access has hardly been used and states that, “The cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use.”¹

The 1992 Senate Report further states that, “The Committee believes that the leased access provision is an important safety valve for anticompetitive practices. The

¹ 1992 Senate Report at 31-32.

Committee also believes the existing provision does not work well and requires revisions.

The legislation carries out this intent by requiring that the FCC establish maximum reasonable rates for access to these channels, as well as for billing and collection...The FCC also shall establish reasonable terms and conditions for carriage. By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels.”²

It has been four years since Congress gave the Commission the irrefutable authority to establish the rules needed to energize the leased access market. The delay in creating effective regulations has caused at least one million dollars in damage to six prospective lessees³ (not counting programmers who have filed lawsuits) and allowed countless cable operators to circumvent the law without consequence.⁴

We know that the Commission is not ignorant of the repercussion of the current leased access rules. “As markets become increasingly concentrated, firms have increased opportunities to coordinate their conduct tacitly or overtly, limit competition, and increase their rates of return.”⁵

“Since the *1994 Report*, the total of national programming services has increased from 106 to approximately 129. Approximately 51% of all national services existing today are vertically integrated. The ten largest MSOs in terms of subscribership have a stake in 99% of vertically-integrated services.”⁶

² 1992 Senate Report at 32.

³ Total revenue loss reported by 6 leased access programmers in complaints filed with the Commission against cable operators.

⁴ No penalties have yet been assessed against any respondent cable operator in a leased access complaint.

⁵ *1995 Cable Competition Report*, FCC, para. 131.

⁶ *1995 Cable Competition Report*, FCC, para. 152.

Cable system consolidation has put control of 60% of the country's cable systems in the hands of the top four multiple system operators (MSOs).⁷ These supersize cable systems will soon be expanding their channel capacity with digital compression and upgrades. In this era of telecommunications growth and centralized control of information sources, it is more important than ever to fill the leased access set-aside and correct 12 years of imbalance in cable programming.

The National Cable Television Association (NCTA) advocates rules for open video systems (OVS) that would prevent discrimination against unaffiliated programmers. In comments on the FCC's *Notice of Proposed Rulemaking*,⁸ the NCTA urges the Commission to "guarantee nondiscriminatory access to programmers" and to "mandate specific procedures to guard against any such bias."

Rainbow Programming Holdings, Inc., a programming subsidiary of Cablevision Systems, asks the FCC to require "full public disclosure of all business relationships between OVS providers and programmers. Rainbow also asks the Commission to institute effective grievance procedures so programmers would not be forced into 'take-it-or-leave-it deals' with operators."

VIPNA urges the Commission to apply these same standards to cable systems.

⁷ "Cable Trading: A Big Deal," *Broadcasting & Cable*, March 11, 1996.

⁸ CS Docket No. 96-46.

ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Billing and Collection Services

The Commission has not provided a valid reason for not establishing specific rules relating to the rates that might be charged for billing and/or collection services. VIPNA believes that the lack of clarification on this issue is preventing premium-service programmers from leasing. At least one complaint has already been filed on this matter⁹ and, if the Commission does not act expeditiously to issue a ruling, the complainant and others like him will suffer financially from delayed market opportunities.

If cable operators were actually interested in the additional revenues that billing and collection services could generate, then they would actively recruit leased access programmers to fill the set-aside mandate. The Commission should establish a cost-based formula similar to the one recommended for lease rates for billing and collection services.

FURTHER NOTICE OF PROPOSED RULEMAKING

Maximum Rate Formula, Economic Justification

The Commission can greatly simplify the leased access formula and ease the Bureau's dispute resolution burden by using benchmark rates based on the costs of average cable systems. This data is readily available from market surveys conducted by independent companies and organizations such as Paul Kagan Associates and the NCTA. To rely on

⁹ Daniel A. Meazell vs. Warner Cable, CSR-4619-L.

cable operators to calculate fair rates based on proprietary information will create a situation in which every leased access programmer will be forced to ask an outside auditor or the FCC to review the accuracy of the rates.

We are not opposed to cable operators making a *reasonable* profit. However, lessees should also make a reasonable profit. Even non-profit programmers must raise funds to support the production and marketing of programming. Congress intended for leased access to become a viable segment of the cable programming market, not public access at a price.

Channel Bumping Costs

Congress mandated in the 1984 Cable Act that cable operators must lease channels to independent programmers and, until contracts were signed with lessees, cable operators could program set-aside channels at their own discretion. “As any cable service offered as of July 1, 1984 is discontinued, that channel will be deemed ‘available’ to meet the operator’s leased access requirements.”¹⁰ Lessees should not be required to pay for bumping networks that operators added or whose contracts were re-negotiated after 1984.

Cable operators that have “borrowed” leased access channels for their own use should not be compensated for impeding the law. Their use of designated leased access channels is a privilege, not a right; for those channels belong to the commercial programming market. Although the statute states that the cable operator may program an

¹⁰ 1984 Cable Act, House Report at 49.

unused channel, it should not be permitted to do so at the expense of leased access programmers.

Choosing Among Competing Programmers

The greatest potential of leased access programming is its ability to serve small, niche markets on a system-by-system basis. If more leased access programmers are competing for capacity after the set-aside is filled, then cable operators should select first from local leased access program producers. We feel this preference for community-based programmers will benefit subscribers and their communities by fostering local businesses and local viewpoints.

Program Categories

We concur with the theory of this proposal on the grounds that segregation of programming according to content raises a First Amendment issue. However, on the other side of the argument is the need to create an efficient leased access model, one that as closely as possible mirrors the cable industry's model.

Congress recognized that the nature of the program service being provided and its implicit ability to pay should play a role in the rate charged. "A premium movie service will obviously warrant a very different and, in all probability, a higher price than a news or public affairs service, and both of these would pose a different pricing situation from an educational or instructional service."¹¹

¹¹ House Report 98-934, p. 51.

We recommend doing away with the “basket” approach to consolidating all leased access programs under a single “average” category. Eliminating the basket approach would remove the primary opportunity for operators to manipulate the system and significantly reduce the need for programmers to file complaints or audit operators’ calculations.

The operator should list, in order, the channels to be bumped. Each calculation would be performed individually. This means that lessees will pay somewhat different rates, depending upon whether or not they are first in the queue. But, once all channels are leased and the market-based rate system cuts in, that will be the case anyway.

We also recommend maintaining different rates for basic and pay services. Thus an operator could not try to block all basic leasing by listing HBO as the first service to be replaced.

With basic networks, the typical pattern is for operators to pay the programmer, which thus earns the programmer a dual revenue stream: operator carriage payments (license fees) plus national advertising. The operator, in turn, gets both the channel to resell to subscribers plus local advertising “avails” which it can sell to local businesses.

The truly marginal basic service channel is cheap for the operator, sometimes even free for an initial period. The operator sells little or no local advertising on this channel, preferring to concentrate its sales effort on more watched channels such as ESPN or CNN. The more watched networks generate considerable local ad revenue, but also have a high per-subscriber license fee.

Rates for per-event or pay-per-view (PPV) leased access programs should be no higher than the minimum amount charged to affiliated premium or pay-per-view

programmers. Operators should carry leased access PPV programs on their PPV channels already designated for that purpose as these channels are already set up for blocking or scrambling and viewers would experience the least interruption in regular channel programming.

Avoiding Leased Access Monoculture

Home shopping networks pay cable operators a percentage of direct sales revenue. This is the only standard carriage programming category that remunerates the operator. This programming category, like premium or PPV programming, earns revenues directly from subscribers.¹² To not separate this programming group from other leased access programmers would weight the maximum rate in favor of one programming group. In addition, it would adversely affect the financial condition of the operator.

Cable operators have raised the danger of a perverse monoculture, where bad-but-lucrative programming drives out everything else. Certainly, such a result would be inconsistent with the public interest and the expressed purposes of Section 612. (It is ironic that operators raise this fear as they are the largest stockholders in non-leased home shopping and infomercial channels.¹³) While home shopping channels pay cable operators a percentage of sales, they are not advertiser-supported channels and thus should be treated as a separate category of leased access programmers. The current

¹² The event promoter receives 40%, the operator receives 50% and the PPV service receives 10% of subscriber revenue. "PPV Faces Identity Crisis," *Broadcasting & Cable*, March 25, 1996.

¹³ Product Information Network (PIN), owned by Jones International, Cox Communications and Adelphia Communications Corp.; Home Shopping Network, owned by TCI; and QVC, owned by Comcast Corp.

industry standard is about five percent of a home shopping channel's gross sales on the cable system going to the operator.

Designating Leased Access Channels

Another advantage to establishing program categories is that it will decrease the risk of operators "weighting" the designated set-aside with lucrative pay channels. Cable operators should list the channels to be designated for leased access and perform each calculation individually. Although lessees would pay different rates, depending upon whether or not they are first in the queue, this method would be closer to a real market-based system. Programmers who are most prepared to lease would benefit.

Opportunity Costs

Cable operators should be allowed to figure only the "opportunity costs" of a designated leased access channel prior to enactment of the 1984 Cable Act.

Operators' ad rate cards (published ad rates) do not reflect the actual rates that advertisers pay and the rates can't be proved without auditing the operators confidential records. In addition to ad revenue, the operator incurs expenses by paying a sales rep to find sponsors, a traffic department to receive and log the spot's satellite feed or videotape, and an accounting clerk to invoice and receive payments. Operators may or may not sell avails to local advertisers but these spots are ordinarily used for the cable system's promotions.

Instead of paying a cable operator money for "lost" ad revenue, (which the operator may or may not sell at its discretion), leased access programmers should pay the

operator with comparable ad time. By trading like products for like products, programmers and operators will avoid CPA audits and FCC complaint proceedings.

How Affiliates Influence License Fees

Turner, in partnership with Time Warner's *Sports Illustrated* is preparing to launch a new network called CNN/SI. It is common industry knowledge that Turner will offer decreased license fees for CNN to those operators who also carry CNN/SI.

Broadcast networks often include license fee deals for their affiliated cable networks in their retransmission consent contracts. NBC used its retransmission-consent influence to launch the America's Talking cable network.¹⁴ ABC has said that retransmission-consent negotiations will play an important part in its plans to launch a national cable news channel.¹⁵ The Fox broadcast network gives operators better retransmission deals if they also carry the fX network, which is owned by Fox.

Even unaffiliated networks can influence license fees. MTV offers decreased license fees for systems that also carry VH1. Speer Communications, owner of the MOR Music network, is trading equity shares for cable system carriage agreements.¹⁶

We believe the secretive, confidential nature of standard programming transactions offers strong evidence to support our proposal to use published industry data to calculate leased access rates.

¹⁴ "NBC, Microsoft Will Have Tough Sell," *Multichannel News*, December 18, 1995.

¹⁵ "Retrans Wars Erupt," *Multichannel News*, January 22, 1996.

¹⁶ *Multichannel News*, April 22, 1996.

Administrative Fees for Part-time Lessees

A one-time setup fee would be appropriate for part-time lessees. However, the Commission should not give cable operators the option to establish “reasonable” administrative fees. The past history of implementing leased access regulations, even Congress’ need to mandate set-asides and maximum rates, attest to cable operators abuse of subjective rules.

The Commission should establish an explicit surcharge, such as 5 % of one month’s leased access rate, for programmers leasing less than 10 hours per month. Again, such a surcharge would be simple for operators and programmers to calculate and would reduce the Commission’s oversight burden.

Transition Period for New Formula

Leased access has been in transition for 12 years. Since 1984, cable operators have been required by law to provide leased access. This is long enough for operators and programmers to prepare for a disruption to their current lineups. Any phase-in period should be a maximum of 30 days.

To ease the transition for subscribers, we propose that cable operators include the following statement on all subscriber bills and new subscriber material:

Pursuant to Federal regulation (47 U.S.C. Sec. 532), [name of cable system] is required to designate [number of channels] available for leasing by programmers unaffiliated with [name of cable system]. Program selection on channels [name channels set aside for leased access] may change from time to time without notice.

Requests to Open a New Channel

Cable operators should be required to open any designated leased access channels for any leased access programmer until the set-aside is filled. We urge the Commission to avoid looking for excuses not to fill the set-aside requirement. Operators often use the excuse of “no available channels” to keep leased access programmers off the air.

Part-time Channels

Part-time leasing encourages small businesses and innovation in the television programming market. The Commission can encourage participation by new entrants in this market by requiring operators to set aside two channels for part-time lessees.

Substitution of Minority and Educational Programmers

Discovery airs infomercials for 6 hours per day. The Learning Channel and BET each air infomercials for 3 hours per day. By law, these programmers do not currently fulfill the

90% educational or minority use rule¹⁷ and therefore do not qualify as “educational” or “minority” programmers. We agree, however, that qualified educational and minority programming should be carried on the BST or a CPST that qualifies as a genuine outlet.

CPA Review

We are concerned that operators will refuse to allow outside CPAs to audit confidential programming contracts. This could lead to a drastic increase in complaints filed with the Commission and a further stagnation of leased access. In any case, the lessee should choose the CPA if the two parties cannot agree on an outside accountant because the lessee would bear the financial burden of an audit in which the operator controls the data.

Again, our proposal to calculate the leased access fee based on published industry data would eliminate the need for CPA audits and FCC intervention to resolve disputes.

Time Limit to Resolve Complaints

The Commission should expedite the resolution of complaints until leased access set-aside is full. A lack of time or resources at the FCC is a poor argument for an agency charged with the responsibility for diversifying cable programming sources. If effort is not devoted swiftly to the resolution of complaints, then leased access will continue to languish. Most cable operators understand that the current leased access rules are superfluous because those rules are not enforced expeditiously.

¹⁷ 47 C.F.R. 76.977(d)

Conclusion

Market power refers to the ability of a seller to restrict output below the desirable level and to set a price above costs.¹⁸ Without leased access, nearly all programming carried on a cable system is filtered through a single gatekeeper: the cable operator. Regardless of the number or subjective variety of the programming an operator chooses to carry, there can be no true diversity as long as there is a single gatekeeper making all programming decisions. Cable systems differ from newspaper publishers: the physical connection through a wired conduit gives cable a “bottleneck” over television programming. The result is that, “A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.”¹⁹

When cable operators appealed the U.S. District Court’s decision upholding must-carry rules, they offered leased access as an alternative for broadcasters.²⁰ On cable systems of limited capacity, commercial leased access has the potential to be a vital entry point for a diverse range of alternative providers. As cable systems become a part of the information superhighway it is critical that the ability of third party unaffiliated programmers to gain access to these systems is expanded and enhanced.²¹

The trend today in telecommunications, codified in the 1996 Telecommunications Act, is toward open competition among diverse service providers. With leased access, Congress tried to offer the public a more diverse selection of video programs through the

¹⁸ Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122, para. 72.

¹⁹ U.S. Supreme Court comments, *Turner Broadcasting v. FCC*, June, 1994.

²⁰ “Must-Carry Appealed,” *TV Digest*, December 25, 1995.

²¹ U.S. Representative Edward Markey, January 7, 1994.

gatekeepers of cable distribution. The closed access, non-competitive cable marketplace is out of sync with the intent and spirit of open competition.

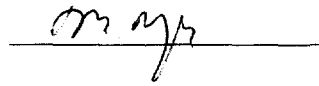
Leased access may have an impact on new and niche standard carriage programmers, those that might be “bumped” to make room for leased access. These fringe programmers are similar to those that complained about the prospect of being bumped to make room for must carry. However, with leased access, those programmers shall be able to lease capacity like any other independent programmer at reasonable rates. Operators are not prohibited from charging less than the regulated rate; that’s why it’s called the “maximum” leased access rate.

If cable operators had complied with the regulations since 1984, then frightened networks wouldn’t now be lamenting the possible loss of ad and affiliate revenues. We point to the cable operators who felt confident enough in the lack of FCC enforcement that they negotiated long-term contracts with standard programmers to fill their leased access capacity.

We seek open and free competition in which any company is free to offer any information good or service to any customer.²² We hope the Commission will further this goal by swiftly enacting reasonable and effective rules to encourage leased access.

²² Vice President Al Gore, January 9, 1995.

Respectfully submitted,

A handwritten signature, appearing to be "m yk", is written over a horizontal line.

Matt York, Chairman
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May 13, 1996

APPENDIX
A Leased Access Rate Formula
Based on Published Data

Total U.S. cable subscribers	61,030,000
Total pay cable units	45,000,000

Revenues

Advertising-supported programming:	
Local cable ad sales	\$1,670,000,000
Annual ad revenue per sub	\$27.36
Monthly ad revenue per sub	\$2.28

Direct Sales Commissions:	
Home shopping network payments	\$120,000,000
Annual commissions per sub	\$1.97
Monthly commissions per sub	\$0.16

Pay-Per-View and Premium Services:	
Total revenue	\$4,522,000,000
Annual revenue per sub	\$100.49
Monthly revenue per sub	\$8.37

Expenses

Advertising-supported programming expenditures:	
National license fees	\$2,437,000,000
Annual expense per sub	\$39.93
Monthly expense per sub	\$3.33

Home shopping programming expenditures	\$0
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Pay-Per-View and Premium Services	\$0
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Net Opportunity Costs (monthly rate per sub):

Ad-supported	(\$1.05)
Direct-sales	\$0.16
Premium	\$8.37

5% Setup Fee for Part-time lessees:

100,000 subscribers, ad-supported program	(\$5,236)
100,000 subscribers, direct sales program	\$819